United States
Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING COMPANY, a corporation,
Plaintiff in Error,
—vs.—
LOUIS ANDERSON,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error from the United States District Court
For the District of Idaho, Northern Division.

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Wallace, Idaho.
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STATEMENT OF THE CASE.

On May 8, 1916, Louis Anderson, the defendant in error, was permanently injured while in the performance of his duties as miner in the Morning Mine, and in the employ of the plaintiff in error, and in due course of time instituted this action to recover the sum of Fifteen Thousand Dollars, alleged as damages for the injuries received by him through the negligence of the plaintiff in error. The case was tried to a jury and a verdict rendered in favor of the defendant in error for the sum of Seven Thousand, five hundred dollars. An application for a new trial was duly made, which resulted in the verdict being reduced from Seven Thousand, five hundred dollars, to Five Thousand dollars, and a new trial denied. This cause is now before this honorable court upon a writ of error from the United States District Court for the District of Idaho, Northern Division.

We will hereafter, for convenience in this brief, refer to the plaintiff in error as the appellant, and the defendant in error as the appellee.

ARGUMENT AND AUTHORITIES.

The attorneys for appellant do not contend in their brief that appellee was not permanently injured while in the employ of the appellant, nor do they make any claim that the damages so reduced by the court below, are excessive. Therefore, we have the right to assume, and do assume, that appellant concedes that appellee was permanently injured and that the verdict as reduced is not excessive.

A careful examination of appellant's brief discloses that the judgment herein is sought to be reversed upon two grounds only, namely:

First: That appellee was not entitled to recover because it was not alleged in the complaint that the shifter, or shift boss, assured or represented to appellee that the place where he was performing his duties was safe, and directed him to proceed with his work without further testing its safety; and

Second: That the evidence is insufficient to warrant or justify the verdict and judgment.

Addressing ourselves to the first of these contentions we insist, that the well recognized rules of pleading require only ultimate facts, and not probative facts, to be pleaded. Courts are loath to permit a mere omission or technicality in a pleading to defeat the ends of justice. It is only in cases where a party is taken by surprise when his adversary attempts to

prove a fact not pleaded, that courts will reject such testimony. In other words, it must be shown to the court, as was not done in this case, that by reason of the failure of appellee to allege in his complaint that the shifter, or shift boss, assured him of the safety of the place and directed him to proceed with his work, the admission of testimony establishing these facts took appellant by surprise and placed him at a disadvantage.

The record will show that appellee and the shifter, or shift boss, Brown, were the only persons present at the time appellee states that Brown held out such assurance, and gave him such directions, and that said Brown and one Andy Berg, were the only persons who had any conversation with appellee with reference to the condition of the ground or place where he was working at the time of the accident. Both Brown and Berg were placed upon the witness stand by appellant, and testified concerning alleged conversations that they had held with appellee just prior to the accident. It therefore follows that appellant was not taken by surprise, that had the complaint contained the allegations which opposing counsel complain that it did not contain, appellant would not have been in any better position to defend the case than he was. It is an old and well established principle of law that in order to successfuly avail one of an erroneous ruling made by the court against him in the trial of a case, it must be shown that such ruling injured or deprived him of some substantial right. This question was fully presented to the court below and is considered and thoroughly disposed of in the decision upon the ap-

plication for a new trial which is incorporated further on in this brief.

The testimony clearly shows that at the time of the accident appellee was using every reasonable precaution in endeavoring to make the place where he was performing his duties safe, and that while so doing the shifter, or shift boss, one Mr. Brown, informed him that the place was safe and directed him to proceed with his work. This is the testimony of appellee upon this point:

"Q. What is your name?

A. Louis Anderson.

Q. Where do you live?

A. Mullan.

Q. How long have you lived there?

A. I have lived there about,—next spring it is two years.

Q. What is your business?

A. Miner.

Q. How long have you been mining?

A. What mine do you mean?

Q. How long have you been mining altogether?

A. About eighteen or nineteen years.

Q. In what capacity? What kind of work have done in mines?

A. I was doing the last fifteen years running a machine.

Q. You have acted as a machine man for fifteen years?

A. Yes, sir.

Q. In what mines have you worked in the Coeur d'Alenes?

A. In the Morning.

Q. What other mine?

A. That is all the mine I worked in the Coeur d'Alenes.

Q. Have you worked there fifteen years?

A. No, not there, but in the United States.

Q. Where else besides the Coeur d'Alenes have you worked in a mine as a machine man?

A. I worked in Michigan, around Kerserg.

Q. How old are you ?

A. Thirty-eight.

Q. When did you first go to work for the defendant, the Federal Mining and Smelting Company- When did you first commence to work for the Federal Mining and Smelting Company?

A. I can't understand just exactly what you mean.

Q. When did you first go to work in the Morning mine?

A. In 1915 when I first gone to work.

Q. What month?

A. I couldn't tell you what month; it was in the spring time any how.

Q. Had you worked there up to the time you got hurt?

A. Yes.

Q. What kind of work were you doing in the mine all of that time?

A. In the Morning Mine?

A. Yes.

A. Machine man.

Q. Explain to the jury what a machine man does in a mine, and what kind of a machine he uses.

A. I used a buzzer. I don't know; it has got another name, but they call it a different name.

Q. Tell the jury what kind of a machine that is, and what is done with it in a mine.

THE COURT: What do you do with the machine? How do you operate it?

MR. McFARLAND: Show the jury what you do with that kind of a machine.

A. Just make a hole straight up, just a little on an incline.

Q. What makes that hole?

A. The steel in the drill.

Q. The steel that is put in this drill or driller, is that what you call it?

A. Yes, the drill.

Q. How is that machine run?

A. Just got a hammer inside, and that hammer, known the end of the steel, and then in about six inches, when the steel gone in there, and then take the steel, and you got a handle and turn, and the machine looks like a pipe something, an air pipe, and something like that, but take about four inches, maybe in some places it might be a little more, and then turn it by hand like that, holes around, the hammer and the drill, and put down against and bored.

Q. I will just ask you, is that machine run by air?

A. Yes, it is run by air.

Q. What are these holes made up in the mine for? What do you put these holes in the mine for?

A. They are blasted out, take the ore out.

Q. Now, on the 8th day of May last were you working there in the Morning mine of the defendant?

A. What is that?

Q. On the 8th day of May last were you working in the Morning mine, for the defendant?

A. Yes.

Q. What time did you start to go to work that day?

A. That was in the afternoon, when I started to go, about half past three.

Q. What did you first do when you got into the mine? Tell the jury what all you did when you first went into the mine that day?

A. I got the machine, and look around in the places, if it is safe, and you have got to look that over when the muckers come, and if you see it loose you have got to take it down.

Q. What did you do that morning? Did you find any tools?

A. No. I couldn't find the right kind of tools, what I used.

Q. What kind of tools was used for knocking down the rock or testing the inside of the mine?

A. With a bar.

Q. What kind of a bar was that? How long and how big?

A. Some bars are a little longer and some shorter. You have to use it, this kind of a bar, a high place you have got to get a long bar, and in low places you have got to get a short one.

Q. Did you find a bar there that night?

A. No.

Q. Did you find your drills as soon as you went into the mine?

A. I find a pick on the side there and some steel there, and that is all the tools I have.

Q. Did you do anything towards testing the mine to see if it was safe?

A. I was barring down the loose. I was looking for a bar first, but I couldn't find the bar, and the muckers was working pretty close, and I take a piece of steel and a drill and take them down, and the muckers can work. Then I thought I work to the place for the bar, but I was afraid the loose come down, and might be hurt, and I would get the loose down with a bar and pick and them tools that I had and I couldn't,—my machine—looked for the bar around, and I couldn't find the bar, and I come back to the machine, and I thought I try to take that machine and feel if the place was safe. I take the pick and bar and make it safe as I could, but I ain't sure that place is safe yet. I take the machine and I put the steel in and start her and drill just a little bit with the air, with that hammer, what used to be trying the steel, when they make the hole, but just a little bit, and just when I feel with my hand that steel, and put my other hand at the roof and feel, and come in that little air and work that machine, and can't make that loose rock,—you know when rock is loose or not,—you can find out that way, some big loose,—it is pretty hard to find the back loose there, three or four feet big, it is pretty hard to find

out with a bar, but you put this steel and the drill, and give it just a little bit of air, when the machine start to work, and you put another hand in the roof and the rock, and feel it, and you can feel that, whether it is loose or not. But the shifter come at the same time—

Q. What was his name?

A. Brown.

Q. What was his first name, do you know?

A. I couldn't say exactly what it is.

Q. How long had he been shift boss in that mine?

A. I couldn't tell you. He was shift boss before I come in the mine.

Q. Before you went in there?

A. Yes.

Q. What did your shift boss tell you?

A. The shift boss asked me if I ain't doing nothing here. I says yes, I was barring down the loose, and I couldn't find no bar, and I looked for a bar but couldn't find them; I had the pick and tools I had there, and take it as I come.

Q. What else did he tell you?

A. He said never mind that, that is all right, and start to work and get them holes drilled, and get the holes ready to blast tonight.

Q. Did he say anything to you about whether he had tested it himself?

A. No. He said he found out that the place was all right.

Q. He said he had found out that the place was all right?

A. Yes.

Q. What did you do when he told you that?

A. I started to drill, when he said that place is all right, started to drill and work.

Q. How long did you drill before you got hurt?

A. I think I drilled not more than ten minutes, I couldn't tell you."

While appellee was in the employ of appellant, at the time of suffering said injuries, appellant had promulgated and circulated, for the guidance and direction of its employees, a set of rules, two of which, numbered 2 and 3, respectively, were admitted in evidence upon the trial of this cause. They are as follows:

> "2. It is the duty of all employees to take sufficient time to make the examinations required by these rules, to guard against any dangers from accidents in the mine or its workings.
>
> 3. Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and, if necessary, the foreman or shift boss must be notified."

It will be seen from these rules that an employee working in the mine of appellant is required to make careful examination of the particular place in which he is employed, in order to ascertain if it is safe, and if he finds it unsafe he must take measures to remove such danger, and if necessary, he is directed to notify the foreman or shift boss.

We understand the rule of law to be that where from the very nature of the work in which the employee is engaged the presmises where he is working becomes unsafe as the work progresses, and where he is by law deemed to assume the risk incident to such unsafe premises and it is his duty and not the master's to render them safe as the work progresses and he is actually in the act of rendering such premises safe, and the master comes and directs him to desist and compels him to proceed with his work, or threatens him, or assures him that the place where he is working is reasonably safe, and pursuant to such threats, command or assurances he leaves off or discontinues his effort to make such place safe, and is afterwards injured by reason of the unsafe condition of the place, he may recover unless the danger was so apparent that a reasonably prudent man would not have continued the work even in the face of such commands, threats or assurances.

The testimony in this case brings appellee clearly within this rule. It shows that when he went to work on the day when he was injured he first began to examine the condition of the wall where he was to set his machine in operation. He could not find a bar, the proper instrument, and one which should have been furnished him with which to bar down the loose rock, so he proceeded with his drill to test the wall. The evidence is that had he not been interrupted he would have proceeded until he ascertained whether the place was safe. The shifter, or shift boss, came to where he was and to some degree criticized him for not being at work, assured him that the place was safe and ordered him to proceed with his work and cease testing the wall or back of the stope.

Counsel for appellant contends that the evidence of appellee as to the assurance of safety made, and the directions given to him by the shifter, or shift boss, together with the other evidence adduced upon the trial of the cause in favor of appellee, is insufficient on which to base a verdict and judgment because, as they contend, shift boss Brown denied having had such a conversation with appellee, but on the contrary claims that he warned appellee of the dangerous condition of the place in which he was working, and because further, Andy Berg, the timberman, testified that just prior to the accident he called appellee's attention to the fact that the place was dangerous where he was working. Counsel for appellant evidently do not have in mind the principle so often declared by the highest courts of our land that a verdict based upon conflicting evidence will not be disturbed. It was for the jury and not for the court below to determine whether appellee upon the one hand, and Brown and Berg upon the other, told the truth.

WAS JOHN C. BROWN, THE SHIFT BOSS, A VICE-PRINCIPAL?

Generally speaking, it was the duty of appellant to provide appellee with a safe place to work. To be sure it was appellee's duty to make the place safe as his work progressed but it was the master's duty to give him the necessary assistance to do this. While appellee was in the employ of appellant and in the performance of his duty, appellant promulgated the rules above quoted, thereby delegating this duty to shift boss, Brown, whereby undoubtedly Brown became a

vice-principal. The master by written orders enjoined upon the servant the duty to bar down the rock and take the necessary precautions for safety, but also authorized and directed him to call upon the shift boss when necessary. By this the appellant impliedly commanded appellee to obey the instructions of the shift boss when given. It is not material whether Anderson called upon the shift boss or the shift boss voluntarily went to him; the fact remains that the duty to supervise or pass upon the attempt of the miner to make his place to work safe was delegated by the master to the shift boss and the shift boss accordingly become, and was a vice-principal and his negligence in respect to the delegated duty, is that of the master. Logically, there is no difference between the miner going to the shift boss and the shift boss going to the miner.

Whether appellee was guilty of contributory negligence or whether the risk was so great that to proceed to work even after the commands and assurances of the shift boss, was a question for the jury and it is not surprising that appellee should have taken the word of the shift boss who was held out by the master to be the authority under such conditions and who undoubtedly was placed in charge of a great number of men by reason of his superior knowledge and ability.

The authorities are that:

> "Where a servant knows of defects in machinery, appliances or place of work but is by words, acts or conduct of his master lulled into a sense of safety and continues in the service and is injured by reason of such de-

fects, he may nevertheless recover unless the danger is well known to him or is so plain and obvious that a prudent, careful man would refuse to run the risks."

26 CYC 1213.

"A servant acting under the commands or threats of his master does not assume the risk incident to the act commanded."

26 CYC 1221. (Note 97).

"This rule applies as well when the risk is without as when the risk is within the scope of the servant's employment, and as well when the order is given by a vice-principal or authorized agent as when it is given by the master."

26 CYC 1223; (notes 1 and 2).

Hayworth v. Mineral Co. 79 S. W. 727;

In Bane v. Irwin, 72 S. W. 522, the mine boss was held to be a vice-principal, not a fellow servant.

Graham v. Newbery Coke Co. 18 S. W. 584.

Harder v. Hofer etc. Co. 104 Fed. 282;

"While ordinarily the law reads into contracts of employment an agreement on the servant's part to assume the known risks of employment so far as he has the capacity to realize and comprehend them yet this implication may be abrogated by an expressed or implied contract to the contrary. If the servant complains to the master that the instrumentality appears to be dangerous and there-

upon the master commands him to proceed with the work and assures him there is no danger, the law implies a quasi new agreement whereby the master relieves the servant of his former assumption of risk and places the responsibility for resulting injuries upon the master."

Bush v. West Yellow Pine Co. 58 S. E. 529.
Marquette Co. v. Williams, 82 N. E. 424.
City of Owensboro v. Gabbert, 122 S. W. 178.

In this case it is held that where the place of work was not such as imposed upon the master the full duty of providing a safe place but that the servant was assured by the master or representative that it was safe, he could recover for injury, as the assumption of risk did not apply in the face of the master's assurance. In this case the servant was assured by the superintendent.

Price v. Haley, 125 S. W. 720,
East Tennessee etc. v. Bowen, 137 S. W. 523;
Anderson v. Pitt. Min. Co. 114 N. W. 953;
Buckard v. Leshen Co. 117 S. W. 35;
Hoover v. West C. & M. Co. 142 S. W. 465;
Ohio Copper M. Co. v. Hutchins, 172 Fed. 201;
Postal Teleg. Co. v. Grantham, 187 Fed. 52;
Allen v. Schuan Co. 127 Fed. 609;

In Carder v. Baldwin, 81 S. W. 205, the facts were very similar to those in the case at bar. Plaintiff was held to have properly relied upon the assurance of the mine boss, who was held to be a vice-principal.

In Alaska Gold Mining Co. v. Muset, 114 Fed. 66, the

mine foreman, who had duties similar to those imposed upon shift boss, Brown, was held to be a vice-principal.

Bunker Hill & Sullivan Co. v. Jones, 130 Fed. 813.

"If the act be one that the master owes to the servant and he delegates it to another servant, that servant is a vice-princpal."

Mast v. Kern, 75 A. S. R. 58. (note.)

Counsel for appellant have cited and quoted from numerous decisions, not one of which is in point.

The decision of the eminently able court before whom this cause was tried, denying the appellant's application for a new trial, is a better brief for appellee than his counsel are able to write. It clearly and very forcefully dispells every doubt as to the shift boss being a vice-principal of appellant, and we cite it with great confidence. It is as follows:

"It must be conceded that while the case approaches, it does not fall within, the exceptional rule that where the character of the work is such that the condition of the place, in respect to safety, necessarily changes and is constantly shifting as the work progresses, the master is relieved from his primary obligation to keep the place safe. The reason this exception is that it would generally be impracticable, and sometimes impossible, for him in such case to provide a safe place. In tearing down a structure, for example, or in blasting down coal in a coal mine, or barring down rock in a mine such as the one herein involved, conditions change from moment to moment, and it is wholly beyond the power of the master to make

inspection or to provide for the safety of employes; the latter must look out for themselves. But in the instant case such was not the condition at the time of the accident. The plaintiff was not "making his own place"; he was drilling holes into, not shattering, the solid rock, or loosening that which had been shattered. He might have worked indefinitely without substantially weakening the back of the stope or affecting the safety of the place where he was at work. If the place was dangerous when he went on duty, it was so as a consequence of the blasting which had taken place before. The blasting had been completed before his shift commenced, and the evidence abundantly shows that it was entirely practicable by inspection to determine whether or not the stope was safe, and, if not, in what particular it was unsafe, and furthermore it was practicable to put it into safe condition before the plaintiff entered upon the work of drilling. The defendant's printed rules, offered in evidence, recognize the practicability of safeguarding against accidents of this character, and the testimony on both sides supports this view. Indeed I do not understand that the defendant now contends otherwise. *Bunker Hill and Sullivan M. Co.* v. *Jones*, 130 Fed., 813. We start out, therefore, with the premise that primarily it was the positive, non-delegable duty of the defendant to make an inspection of the stope after the blasting was completed and before the work of drilling for additional blasts was resumed. Such inspection was not a detail of operation, but related to the duty of providing a safe place to work. To meet this view, the defendant invokes another well-recognized exception to the general rule, namely, that the master is relieved from responsibility for dangerous

conditions where the injured employe, here the plaintiff, is, by express custom or contract, charged with the duty of making the place safe. In support of this branch of its defense, it introduced certain standing rules, by which employees are enjoined to take sufficient time to make the required examinations for the purpose of guarding against accidents, and tc see that the place where they are employed is safe. It is very much to be doubted whether the plaintiff ever read these rules or heard them read or explained, but perhaps that consderation is unimportant in view of the conceded fact that he recognized it to be a general custom and rule in mining operations of this character for the experienced miner, such as he admits he was, when going on shift, to make a proper inspection, and, if necessary, to bar down loose or shattered rock from the back of the stope. In short, he recognized that it was his duty to look out for his own safety in this respect. In response to this contention on the part of the defendant, which he concedes to be well founded both in fact and in law, the plaintiff claims that, recognizing his duty in this respect, he was engaged in making inspection as best he could, although the appliances reasonably necessary for that purpose were not at hand, and would have been able to detect the perilous condition of the slab which later fell upon him, and would have avoided the danger, had the foreman or shift boss not assured him that the place was safe, and ordered him to go to work with his drill. There is sharp conflict in the testimony upon this issue, he asserting and the foreman denying that such a conversation took place. The foreman testified that he himself called the plaintiff's attention to what he regarded as a dangerous condi-

tion, but that the plaintiff assured him that it was all right, and that in any event he, the plaintiff, was standing in such a position that if the slab fell it would not hurt him. The instructions were very specific upon this issue, and the verdict necessarily implies that the jury believed the testimony of the plaintiff and discredited that of the foreman. It was preeminently an issue for the jury, and their finding must be accepted as conclusive of the fact. It therefore remains to consider whether or not as a matter of law the defendant can be held responsible for the consequences of the imprudent and negligent conduct of its foreman or shift boss in directing the plaintiff to forego inspection, with the assurance that the place was safe, and in ordering him to go on with his work. As I understand it, it is conceded by the defendant that if the foreman, in respect to this direction to the plaintiff, was acting for and in the place of the defendant, was in effect a vice-principal, then the defendant could properly be held responsible, (Ohio Copper Co. v. Hutchins, 172 Fed 201). but it vigorously protests that the shift boss, though occupying a position of superiority to the plaintiff, is in law to be deemed merely his fellow servant, and that therefore the case is one where the plaintiff, in accepting employment, assumed all risk of danger from his negligence.

The record is not very specific touching duties of the foreman, but it is fair to infer that upon his shift he had complete charge of the mining operations upon the sixteenth and eighteenth levels of the mine, comprising twenty-two floors, At the particular time he had supervision of the work of from thirty-five to forty men, who were engaged here and there

upon the several floors, and ordinarly he was able to visit each place where the work was going on twice during the shift. It is further to be inferred that he himself did no manual labor, but that his entire service was that of directing and superintending the work of others. Under these circumstances it is not entirely free from doubt that in respect to mining operations, strictly speaking, he was a fellow servant with the plaintiff. *Carnegie Steel Co.* v. *Yuhasz,* 224 Fed. 438. *Alaska M. Co.* v. *Muset,* 114 Fed. 66. But that question it is unnecessary to decide. We are here concerned with his status in relation to the positive duty of the defendant to use reasonable care to maintain the stope in a reasonably safe condition, for his imprudent instructions to the plaintiff pertained not to the manner of mining but to the matter of making the stope safe. The distinction is clearly drawn in *Kelly* v. *Mining Co.,* 41 Pac. 273, cited with approval in *Bunker Hill and Sullivan M. Co.* v. *Jones,* 130 Fed. 819.

In disposing of this particular question, I was at the trial, and upon more mature reflection I still am, inclined to attach much significance to one of the defendant's standing rules, which it offered in evidence, namely, where it is provided that "each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and if necessary the foreman or shift boss must be notified." Doubtless the condition existing at the time of the accident was one falling within the class covered by this rule. Under the rule, it was the duty of the plaintiff himself

to make examination to see whether the stope was safe before he commenced work. But it further seems to be equally plain that it was the intention of the defendant to constitute the foreman or shift boss its representative in respect to matters of safety, with power to determine what to do, and with authority to direct and control the miners in respect to such matters. Suppose that the plaintiff in this case had taken the time, and had been successful in discovering the defective condition of the stope, and, concluding that the defect was of such character that he could not remedy it, he desired to appeal to the master to make the place secure, where would he have gone? How could he have communicated with the defendant? Is it not manifest that this rule directed him to go to the foreman or shift boss? Did not the rule impliedly say to him that in respect to matters of safety he was to recognize the foreman as being the principle? Otherwise why notify the shift boss? There is no further provision that the shift boss should thereupon report to any other officer or agent. The fact that here the shift boss came to the plaintiff instead of the plaintiff reporting to him, does not alter the case. If within this sphere the foreman was a vice-principal, his instructions were the instructions of the defendant, and necessarily imposed responsibility. Can there be any doubt of the consequences had the plaintiff declined to go on with his work when the foreman directed him to desist from further inspection, with the assurance that the place was safe? While the record does not expressly disclose the power of the foreman to discharge, such authority is to be inferred from the general nature and dignity of the position he occupied, and indeed in the argument it is conceded. Not that

this consideration is controlling, but it may be resorted to for light upon the question whether or not the parties understood that the plaintiff assumed the risk of the foreman's negligence in respect to conditions of safety. The doctrine contended for is so harsh that I am not inclined to give it place except upon the clearest authority. It seems to me that it would enable employers, by adopting the system here employed, practically in all cases to withdraw from the employe all substantial protection which the general rule of the master's positive, non-delegable duty was designed to afford. Nor when we come to examine the decided cases upon the subject do we find such clear authority. The defendant has furnished a very elaborate and able brief upon the question, with numerous citations. It is not strange that in none of them were the facts precisely the same. Personal injuries happen under the greatest variety of circumstances, and personal injury claims often turn upon very slight distinguishing features. It is to be presumed that, out of the great multitude of cases, counsel have cited those deemed to be most favorable to their contention. But upon examination it is found that most of them relate not to the maintenance of a safe place in which to work, but to the mere details of carrying on the work. We may briefly notice a few of them. In *City of Minneapolis* v. *Lundin,* (C. C. A. 8th Circuit), 58 Fed, 525, the work of blasting was being carried on continuously. Obviously it was wholly impracticable for the defendant city to keep safe the place where the plaintiff was at work. Assuming that his injury was the result of the negligence of the foreman of his gang, the court discussed the legal principles applicable, and in the course of the discus-

sion it was said that: "Whether or not the master is liable for the negligence of such a servant (a foreman) in a given case must be determined by the nature of the duty in the performance of which he was guilty of negligence. If he was engaged in discharging an absolute duty of the master the latter is liable, otherwise it is not." But here, as already shown, the action of the shift boss related to an absolute duty of the master, the duty to inspect the stope for the purpose of seeing whether or not it was safe. In *Alaska Mining Co.* v. *Wheelan,* 168 U. S. 86, very frequently cited, the gist of the case is stated in one sentence of the syllabus, namely: "And the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men." Very clearly there was not involved in the case any question of a safe place to work or of suitable and safe machinery and appliances. As the court said: "There was no evidence that he (the foreman) was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the man, for its use." In *Martin* v. *Atchison, etc., R. R. Co.,* 166 U. S. 399, the foreman of a section gang, while traveling on a hand car, directed one of his men not to look out for approaching trains, and he, the foreman, carelessly failed to keep a lookout, but clearly this negligence related only to a detail of the work. In *Larson* v. *McClure,* 70 N. W. 662, the court said: "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants

practically created the place and its attendant perils from hour to hour in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as the probable consequences, they must be held to have had notice." These cases are typical of the great majority of the decisions cited by counsel, and manifestly are not conclusive, even if we regard the shift boss as a fellow servant with the plaintiff insofar as concerns his primary duty of mining, as distinguished from his authority in the matter of maintaining safe conditions. In *Florence & C. C. R. Co.*, v. *Whipps*, 138 Fed. 13, another case cited, the court lays great emphasis upon the fact that an emergency existed, and that careful inspection by the railroad company was impracticable. It was also held that plaintiff knew and was able to appreciate the perils, and assumed the risk. Still another case upon which the defendant relies. *Kelly* v. *Jutte & Foley Co.*, 104 Fed. 955, is not so easily distinguished, but with all due respect to the learning of the court, the reasoning of the decision does not impress me as being highly persuasive. Moreover, it seems to me to be out of harmony with the principles recognized in *Metropolitan Redwood Co.* v. *Davis*, (9th C. C. A.), 205 Fed. 487.

Further in support of its contention, the defendant has cited *Davis* v. *Trade Dollar M. Co.*, 117 Fed. 122, *Bunker Hill etc.* v. *Schnelling*, 79 Fed. 263, and *The Westport*, 136 Fed. 301 —all decisions from the Circuit Court of Appeals of this circuit. While possibly tending to support the proposition that in matters of operation the shift boss and the plaintiff were fellow servants, the Schnelling and Westport cases have little, if

any, direct bearing upon the precise question under consideration, which pertains not to matters of operation, but to the safety of the conditions under which the operatives were required to work. The facts in the Davis case are more nearly analagous, but it is readily distinguishable. Davis, a miner, was injured by the explosion of a missed shot. As his shift came on duty he and his associates were informed by the foreman of the preceding shift that there were two missed shots, one in the back and one in the bottom of the tunnel. It turned out that one of these shots was in the breast rather than the bottom of the tunnel, but the court found that Davis knew that the preceding foreman had made no investigation, and he, the plaintiff, instead of making a careful investigation, assumed that one of the missed shots was under a pile of debris. It was held that he himself was negligent. The court says: "The rules of ordinary prudence required the plaintiff in error to require some member of his shift, before beginning to drill, to make examination in the face of the tunnel, and discover the location of the unexploded blasts, and the evidence shows that the plaintiff in error himself made the examination. The foreman of the retiring shift did not pretend to say that he had made such examination, * * * The plaintiff in error, while making his examination, did not take the trouble to remove the debris at the bottom of the tunnel, which derbis he erroneously supposed concealed an unexploded hole."

In conclusion upon this point, I think it must be held that primarily it was the positive duty of the defendant, by reasonable inspection, to maintain the stope in which the plaintiff was working in a reasonably safe condition; that such inspec-

tion would reasonably have been made subsequent to the explosion of the blasts fired by the preceding crew, and the method employed by the defendant in carrying on its mining operations contemplated such inspection; that it was proper for the defendant to impose upon the members of the succeeding shift the duty of making such inspection and of barring down all loose rocks before they commenced the work of drilling, and such was the duty of the plaintiff in this case; that, as the jury found, while plaintiff was so engaged in making the place safe for work, and before he had completed his investigation, he was directed by the foreman to desist from further inspection and to go to drilling, with the assurance that the place was safe; that the defendant had constituted the foreman its representative in respect to matters of safety, with authority to receive reports from subordinate employes and to act and give directions upon its behalf and in its stead; that, therefore, in effect, when the foreman directed the plaintiff to desist from further inspection and to go to work with his drill, the defendant relieved the plaintiff from the duty imposed by its general rules, of making the place safe, and itself resumed the full obligation and responsibility of a master in that respect.

It is further earnestly insisted that a new trial should be granted because, owing to the general nature of the averments of the amended complaint, the defendant could not anticipate the claim that the foreman had given this direction to the plaintiff, and that therefore, to its great prejudice, it was taken by surprise at the trial. It must be conceded that in the light of the evidence the complaint is not free from

criticism and is somewhat misleading; it should have more particularly advised the defendant of the precise claim which would be made. I am not satisfied that counsel for the plaintiff wilfully drew the complaint in such a manner as to withhold information touching this claim. The plaintiff is a foreigner ,and it was very difficult to understand him when he was upon the witness stand, and it is entirely possible that the precise nature of what occurred was not known to his counsel until he testified. I do not think that there is a variance between the allegations and proofs, for the negligence alleged and relied upon by the plaintiff is the failure of the defendant to provide a safe place in which the plaintiff was required to work. It is true that in the course of the trial it appeared from one aspect of the testimony that the defendant had relieved itself of this obligation, and that the plaintiff himself had assumed it, but ,as I have held, from another aspect of the testimony, it appears that by reason of the directions of the foreman to the plaintiff, he, the plaintiff, was temporarily relieved from such obligation, and that the defendant thus resumed full responsibility in the premises, and that the accident occurred as a result of its failure to discharge its obligations thus temporarily resumed, so that after all the charge in the complaint that the defendant failed to provide a safe place to work is sustained by the proof. As I have already stated, the complaint is subject to criticism in being inaccurate and in not being sufficiently definite, but the defendant made no claim at the trial that it would suffer any serious prejudice if the trial was permitted to proceed, and even now though arguing that it was taken by surprise, and that it could present a much

better record upon another trial, no showing has been made of the respects in which additional testimony could be adduced. Apparently all persons who had any knowledge of what occurred were present and testified, and no showing is now offered touching any additional specific evidence. I do not think that under the circumstances I would be justified in granting a new trial upon this ground alone.

Finally it is contended that the verdict is excessive, and I am inclined to concur in this view. Such was the very strong impression I had at the time it was returned, and I have not been able to escape the conviction that it ought to be set aside, if it is not diminished. The rules under which such action is taken, and the conditions justifying it, are well understood and need not be discussed. I have therefore concluded to direct that unless the plaintiff is willing to remit $2500.00 of the verdict, and let it stand for $5000.00, a new trial will be granted. A written statement remitting the $2500.00 should be filed with the clerk within ten days from the date hereof, otherwise an order will be entered granting a new trial."

In our opinion, based upon the authorities above cited, and upon the learned opinion of the Honorable Frank D. Dietrich, Judge of the court below, the judgment should be affirmed.

Respectfully submitted.

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